REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO 21 OF 2020

IN THE MATTER OF ARTICLES 1, 10 (1) & (2), 19(1), 20 (1), 21 (1), 22 (1), 25, 27, 28, 47, 48, 50 (1), 75(1), 118, 159, 165, 232 AND 258 OF

THE CONSTITUTION, 2010

AND

IN THE MATTER OF: VIOLATION AND/OR INFRINGMENT ON THE FUNDAMENTAL RIGHTS OF THE PETITIONERS

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

IN THE MATTER OF: SECTION 12 OF THE COUNTY GOVERNMENT ACT, 2012

IN THE MATTER OF: SECTION 46 OF THE COUNTY ASSEMBLY SERVICE ACT, 2017

IN THE MATTER OF: SECTIONS 49, 194 AND 195 OF THE STANDING ORDERS OF THE ASSEMBLY

IN THE MATTER OF: KISII COUNTY ASSEMBLY, KISII COUNTY

IN THE MATTER OF: THE COSNTITUTION OF KEMYA

(PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

DR. JOASH KERONGO.....1ST PETITIONER

DR. CAREN NYANGANYI NYANGWESO.....2ND PETITIONER

VERSUS

THE SPEAKER OF THE COUNTY ASSEMBLY KISII COUNTY.....1ST RESPONDENT

THE COUNTY ASSEMBLY – KISII.....2ND RESPONDENT

AND

THE COUNTY ASSEMBLY SERVICE BOARD, KISII.....INTERESTED PARTY

RULING

1. The application before me is a notice of motion application dated 8th December 2020. The application is supported by the affidavit of Dr. Joash Kerongo.

2. According to the applicants, they were appointed as the external members of the County Assembly Service Board, Kisii County, to

represent the interest of the special group and the general public.

3. On 17th November 2020 members of the 2nd respondent raised a motion for the removal of the applicants but they soon realized that the respondents having been external members of the interested party their removal should be initiated pursuant to a petition lodged by a member of the public. A similar petition dated 19th November 2020 was generated by a member of the public and the members are now keen on deliberating upon the petition with a view of removing the applicants without affording them a fair hearing. The petitioner alleges that in the event the respondent is allowed to continue with the deliberations the applicants shall stand to be removed from the membership of the interested party without any notice or audience.

4. He also averred that the allegations in the petition against him were factually incorrect. He explained that the dispute concerned the Group Life and Group Accident cover which had not been operationalized. The applicants contend that it was the responsibility of the interested party and not just the applicant's decision to ensure the operationalization of the Group Life and Group Accident cover.

5. It was advanced that in any event, the removal of the applicants from office cannot be done without public participation. It was averred that although **section 10 (2)** and **(3)** of the **County Assembly Service Act 2017** has provisions for their removal, the terminology 'any person' in the said provision creates an absurdity as it connotes that any person irrespective of his abode or interest in the affairs of Kisii county can lodge such a petition for their removal. The said sections envisages a scenario where the rights and interests of a citizen can be impugned without affording them an opportunity to be heard, and to that extent, the said sections are unconstitutional and in contravention of the provisions of **Articles 10(2), 27, 47** and **50 (1) of the Constitution, 2010**.

6. The pending prayers are for orders that;

> *7. The Honourable Court be pleased to grant a Conservatory Order, barring and/or Respondents either restraining the Respondents either by themselves, agents, servants and/or employees, from deliberating on and/or debating on prosecuting, (sic) the November 2020 and which impugned Petition dated the 19th day of is currently scheduled for debate day of December 2020 and whose and/or deliberations on the 10th purport is to remove the membership of the Interested Petitioners/Applicants from the Party, which are neither Party, albeit on actions and/or (sic) omissions of the Interested chargeable on the Petitioners/Applicants, pending the determination of the Petition herein.*
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> *8. The Honourable Court be pleased to grant a Conservatory Order, barring, prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees from making any Decisions and/or Recommendations pertaining to and/or concerning the impugned Petition dated the 19th November 2020, without affording the Petitioners/Applicants an opportunity to be heard in Defence and/or without regard to the Due process of the law, pending the hearing and determination of the Petition herein.*
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> *9. The Honourable Court be pleased to grant a Conservatory Order to Protect, Preserve and/or Conserve the status of the Petitioners/Applicants as the duly appointed Members of the interested Party, in accordance with Section 12(3)(d) of the County Government Act2012 as read together with Sections 10 and 46 of the County Assembly Service Act 2017, which confers upon the Petitioners/Applicants legitimate expectations.*
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> *10. The Honourable Court be pleased to grant an Order of Temporary Injunction, restraining and/or prohibiting the Respondents, more particularly, the 1st Respondent from accepting, implementing and/or executing (sic) any Recommendations and/or Resolutions of the2ndRespondent made on the basis of the impugned Petition dated the 19th day of November2020, pending the hearing and determination of this Petition.*
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> *11. The Honourable Court be pleased to grant an Order of Temporary Injunction, restraining the Respondents jointly and/or severally, either by themselves, agents and/or servants from receiving, accepting, acting upon and/or constituting any other person as duly appointed members of the Interested Party in lieu of the Petitioners/Applicants, in violation of Articles 10(2), 27, 28, 47, 50(1) and 232 of the Constitution, 2010 pending the hearing and determination of this Petition.*
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> *12. The Conservatory Orders, if any, granted by this Honourable Court to be implemented and/or enforced by the O.C.P.D, Kisii Central Police Division and/or such other officer as the Honourable Court may Decree.*

7. Despite being served with the application, the respondents failed to file a reply thereto.

8. At the hearing of the application, Mr. Oguttu counsel for the applicants argued that the applicants being external members of the interested party means that they cannot be removed by the respondents without public participation in accordance with **Article 10 (2)** and **118** of the **Constitution**. He cited the case of **Clerk, Nairobi City County Assembly v Speaker Nairobi City County Assembly & Another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** where the court held as follows;

> *"37. Finally, section 48 of the County Assembly Services Act provided for the transition as follows:*
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> ***"48. (1) Subject to subsection (2), each county assembly shall appoint the members of a County Assembly Services Board under section 12(3)(b),(c) and (d) of the County Governments Act within thirty days after the commencement of this Act.***
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> ***(2) Upon the commencement of this Act and before the first general election held after coming into force this Act, a person, who immediately before the commencement of this Act served as a member of a County Assembly Service Board appointed under section 12(3)(b)(c) and (d) of County Governments Act in force before the commencement of this Act, shall continue to serve as a member of the Board, as one of the persons, appointed under section 12(3)(b)(c) and (d)."***

38. The foregoing provisions provide for the key organ (2nd respondent) which is the employer of the staff in the County Assembly Service. They are clear and unambiguous provisions which speak for themselves. The court takes judicial notice that the County Assembly Services Act came into force on the 27.7.2017 and as such subsection 48(2) of the Act applied to the existing board until the first general election after the said commencement date. The court further takes judicial notice that the first general election after the said commencement date, took place in August 2017 after which section 48 of the Act became obsolete and paved the way for reconstitution of the board under the amended section 12 (3)(b)(c) and (d) of the County Governments Act.

39. The 1st and 2nd interested parties alleged that after the said general election, the 2nd respondent board was never constituted as required under the amended section 12 (3)(b)(c) and (d) of the County Governments Act. They further contended that they never nominated their representatives to the board as required for the majority and minority parties in the county assembly. According to their pleadings, they finally nominated their representatives by the letters dated 16.10.2019 and 22.10.2019 respectively and the names were published in the Kenya Gazette No. 144 of 22.10.2019.

40. The 3rd interested party, however contended in his pleadings that he was nominated by the 2nd interested party (majority party) as her representative to the board while Hon. Okumu Elias Otieno was nominated by the 1st interested party (minority party) to represent her in the board by the letters dated 27.9.2017 and 5.9.2017 respectively. He further contended that they took the Oath of Office on 28.9.2017 which was administered by the 1st respondent after she had taken her Oath of Office which was administered by the petitioner on the same day.

41. The foregoing dispute relating to party nominations arising from decisions by the respective political parties under section 12(3) (c) of the County Governments Act. The proponents of the PO cited several precedents which are unanimous that nominations by political parties are not justiciable and they should be left, in the first instance, to the political parties' internal dispute resolution mechanisms and the PPDT were the need to escalate the same arises. In ***Gabriel Bukachi Chapia Vs ODM & Another (2017)eKLR****the Court of Appeal held that*

> ***"In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.""***

ANALYSIS AND DETERMINATION

9. The application mainly seeks conservatory orders and interim injunctive orders barring the removal of the applicants from office. It is therefore critical to consider the principles that must be established for the grant of conservatory orders. In **Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR**, the Supreme Court discussed the nature of conservatory orders as follows: -

> *"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay."*

10. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** it was stated that:-

> *"25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice….*
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> *26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis….*
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> *28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights….*
>
> *29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice…."*

11. The court in **Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR**, stated:

> *"The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side."*

12. Bearing the principles enunciated in the above cases, I shall proceed to consider whether the applicants have demonstrated a prima facie case with a likelihood of success and that they stand to suffer real danger that is likely to result in a violation of the Constitution if the Conservatory Orders sought are not granted. A prima facie case was defined by the court in **Kevin K. Mwiti Others v Kenya School of Law & Others [2015] eKLR** as follows;

> *"The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success."*

13. The starting point is as it must be **Section 10** of the **Act** which provides for removal of the applicants. It provides as follows;

> *"10. (1) A person who is appointed as a member of the Board under **section 12(3)(d)** of the **County Governments Act** may be removed from office on any of the following grounds-*
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> *(a) violation of the Constitution;*
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> *(b) inability to discharge duties for any reason,*
>
> *(c) bankruptcy; or*
>
> *(d) if convicted of any offence with a sentence of more than six months imprisonment.*
>
> *(2) Any person may petition the county assembly for the removal of the member of the Board on the grounds specified under subsection (1).*
>
> *(3) The procedure for the removal of a member of the Board under this section shall be as prescribed in the Standing Orders of the county assembly."*

14. Although the county assembly has the mandate to remove the applicants from office once a petition has been filed and tabled before them, they must do so in accordance with the provisions of the Constitution and ensure that the right to fair trial is protected. In **Caroline Munanie Musee v. Makueni County Assembly (2014) eKLR**, the court correctly observed that:

> *"26. Right at the outset, I should point out that this court as mandated by the law is not to enter by stealth into the mandate and role of the County Assembly. Its duty would be merely to observe that the procedure of doing business is followed and does not contravene the constitution in any manner. This Court must only focus on the procedure adopted. Where the court finds that the assembly breaches the constitution the court must intervene to ensure the constitution is upheld. In the case of the Speaker of the Senate and Another and the Attorney General and Others (Advisory Opinion No. 2 of 2013 the Supreme Court observed thus:-*
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> > *"We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the constitution which is the Supreme Law of the land. The English tradition of Parliamentary Supremacy does not commend itself to nascent democracies such as ours. Where the constitution decrees a specific procedure to be followed in the enactment of Legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the houses to regulate their internal workings as long as the same do not breach the constitution."*
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> *27. One of the functions of the County Assembly is to remove the Deputy Speaker. The court would not interfere in such business unless there is a clear breach of fundamental rights. Where such breach is proved the court must involve its statutory duty by intervening."*

15. The Supreme Court in **Speaker of the Senate & Another v Attorney General & 4 Others, Reference No. 2 of 2013 [2013] eKLR** stated further that;

> *"…no arm of Government is above the law as the constitution is the guiding light for the operations of all state organs. Consequently, the courts mandate, where it applies, is for the purpose of averting any real danger of constitutional [sic] violation."*

16. Removal of the applicants from office is a serious matter as it impinges on their rights and therefore the process from start to finish must be done in a manner that does not infringe the provisions of the Constitution and the law including the procedure prescribed in the Standing Orders of the county assembly.

17. In this case, a motion to remove the applicants from office as members of the interested party was tabled before the 2nd respondent on 17th November 2017. There is no evidence that the applicants were aware of the allegations against them or that they were served or informed of the Petition dated 19th November 2020 that was later filed for their removal from office. The right to fair trial must entail

adequate notice of what a party is required to answer to in order to remove the element of surprise. What is evident is that the respondent intended to hastily remove the applicants from office without notifying them of the infractions they had committed while in office contrary to **Article 47** of the **Constitution**.

18. In the circumstance, I find that a prima facie case has been made that the respondent's violated the petitioner's constitutional right to a fair administrative action under **Article 47** of the **Constitution** as embodied in the **Fair Administrative Actions Act, 2015**.

19. The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** para 23 had this to say on the application of **Article 47** of the **Constitution**;

> *"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."*

20. The petitioners have laid a basis for the test over the constitutionality of the impugned action by the respondents. Am persuaded that bereft of conservatory orders, the Petition herein or its substratum will be rendered nugatory.

21. With the result that the notice of motion application dated 8th December 2020 is wholly successful and is allowed. I make the following orders;

1. **The notice of motion application dated 8th December 2020 is allowed in terms of prayers 7, 8, 9, 10 and 11.**

2. **Costs to abide the outcome of the Petition.**

Dated, Signed and **Delivered** at **Kisii** this **28th** day of **April, 2021.**

A. K. NDUNG'U

JUDGE